S.B. Regular First Appeal No. 107/1989
Firm Nemichand Baijnath and another Vs. Ratan Lal

Date of Order: May 25, 2006

HON'BLE MR. K.C.SHARMA, J.

Mr. Sagarmal Mehta, Sr. Advocate with
Mr. Anil Mehta for the appellants
Mr. B.L. Mandhana for the respondent.

This civil first appeal under S. 96 CPC arises out of the judgment and decree dated 7.7.1989 passed by the learned Additional District Judge, Karauli, Camp at Hindaun, by which the learned Judge has decreed the plaintiffs' suit against the defendant appellants for Rs. 11,070/-.

As per averments in the plaint, the plaintiff respondent carries on his business in the name and style `Subhash Chand Tej Kumar' at Hindaun, while defendant appellant carries on his business in the name and style `Firm Nemichand Baijnath' in New Mandi, Hindaun City. On 2.1.1982 the defendant No.2 borrowed a sum of Rs. 10000/- (Rs. 9000/- through cheque and Rs. 1000/- in cash) from the plaintiff, for business of his firm, defendant No.1 and executed a pro-note and a receipt in token of receipt of loan and agreed to pay interest @ 1% per month. The plaintiff tried his level

best to get back the loan amount along with interest, but all in vain. Ultimately, the plaintiff had no option but a file a suit for recovery of Rs. Rs. 11,070/-.

The defendants contested the suit by filing written statement, denying execution of pro-note and receipt on the ground that they were not properly stamped and hence cannot be read in evidence. The defendant No.2 has also denied the allegation of the plaintiff that he is owner of the firm M/s Nemichand Baijnath. According to defendant No.2, the firm is a registered partnership firm, of which Sardilal and Ramjilal are the partners. The defendant has also pleaded that plaintiff has not only received the aforesaid sum, but has received from him a sum of Rs. 20,300/-, of which there exist entry in the cash book as also the signature of plaintiff beneath the entry. According to defendant, the plaintiff has filed the present suit solely with a view to lower down his prestige, after he claimed his dues.

On the basis of pleadings of the parties, the learned trial court framed issues and at the conclusion of trial and on consideration of evidence, decreed the

plaintiff's suit for Rs. 11,070/-.

Learned counsel for the defendant appellants, in view of the statement of defendant, has not challenged the findings arrived at by the learned trial court on the issues except issue No. 3 and that too, only to the extent it relates to the payment of Rs. 4900/- through cheque. Learned counsel for the appellants has contended that payment of Rs. 4900/- was made to the plaintiff on 19.1.1982 through cheque drawn on State Bank of Bikaner & Jaipur, Hindaun and the same was duly encashed by the plaintiff himself on the next day as would be evident by the certificate dated 13.12.86 issued by the Bank.

It appears from the record that the defendant Nemi Chand filed an application under Order 13 Rule 2 CPC on 23.7.85 for bringing on record the statement of account issued by the State Bank of Bikaner and Jaipur on 22.7.85 so as to prove that he had issued a cheque of Rs. 4900/- bearing No. 647916 dated 19.1.1982 in favour of plaintiff and the plaintiff had encashed the said cheque.

Before proceeding further, it important to note that the case was fixed for pronouncement of judgment

on 23.7.1985. But before the judgment could be pronounced, the defendants filed an application under Order 13 Rule 2 CPC with a prayer that statement of accounts be admitted in evidence. The trial court after hearing the parties, did not find any substance and dismissed the application vide order dated 30.7.1985. Defendants challenged the order dated 30.7.1985 dismissing their application under Order 13 Rule 2 CPC in revision petition before this court. This revision No. 803/85 came to be heard by this court on 21.8.1986 and was dismissed on the ground defendants have not been able to make out a sufficient cause for delay in producing the document. Where a document has not been produced in accordance with the requirements of O.13 R.1 CPC and the document is in the power or possession of the party wanting to produce it, then that party has to make out a good cause to the satisfaction of the court for not producing it earlier.

It was in these circumstances that the defendants having remained unsuccessful even in revision before this court, filed the application under O.6 R. 17 CPC, thereby seeking amendment in para 2 of the written statement. The trial court having found that the

amendment sought to be made in the written statement was not at all necessary for the just decision of the suit, dismissed the said application vide order 11.3.1987.

Along with the appeal against final judgment and decree dated 7.7.1989, the defendants have filed an application under Order 41 Rule 27 CPC with the prayer that certified copy of the registration certificate of the firm along with the list of its partners as also the certificate of the State Bank of Bikaner and Jaipur dated 13.12.1986 may be taken on record as an additional evidence. However, copy of the registration certificate of the firm was not annexed with the application.

The trial court has framed issue No.1 to the effect, whether Firm Nemichand Baijnath is a registered firm and Nemichand, defendant No. 2 is the owner of the partnership firm? In the written statement, it has been averred that defendant No.1 is a registered firm, of which Sardilal and Ramjilal are partners and defendant No. 2 is neither a partner nor owner. However, in his statement Nemichand has categorically admitted that he used to issue cheques in his capacity as partner of the

firm. He has also admitted that pro-note Ex.1 and receipt Ex.2 bear his signatures. On both these documents he has shown himself to be the owner of the firm. PW2 Ramesh in his statement has specifically stated that the licence, Ex.16 was issued in the name of M/s Nemichand Baijnath and Nemichand, defendant No. 2 is the Proprietor. He has further stated that Sardilal, Ramjilal and defendant Nemichand have been shown in Ex.16 as partners of the firm. In refuting the above statement, the defendant No.2 has not been able to get anything disclosed, on the basis of which it could be said that evidence of PW1 Ramesh is doubtful or not worthy of acceptance. In this view of the matter, it must be concluded that defendant No. 2 is the Proprietor of the firm, defendant No.1.

So far as certificate dated 13.12.1986 issued by the State Bank of Binaker & Jaipur is concerned, which has been prayed to be taken on record by way of an application under O.41 R.27 CPC, suffice it to observe that it is not at all a relevant document. According to the said certificate the Branch Manager of the Bank has certified that “cheque No. 647916 dated 19.1.1982 issued by M/s Nemichand Baijnath in favour of self for

Rs. 4900/- has been paid to Shri Ratan Lal on 20.1.82". I fail to understand as to how this certificate would be relevant for the just decision of the case. According to this certificate, this was a bearer cheque. The certificate simply mentions the name of Ratan lal who has received payment of the cheque on 20.1.1982. It is not clear as to who is Ratan Lal, whether it is plaintiff or some one else. Even it does not discloses parentage of Ratan Lal. In the absence of these important particulars, even if this document is permitted to be taken on record, it would be of no help to the defendants inasmuch as this certificate would not be sufficient to infer that cheque for Rs. 4900/- as aforesaid was given to plaintiff Ratanlal and plaintiff is the person who got the cheque encashed.

In cross examination, defendant Nemi Chand has stated that the cheque was of Hindaum Branch of the State Bank of Bikaner & Jaipur. The number of cheque is 647916. According to him, he did not remember whether it was `bearer' or `order'. He also did not remember whether it was a cross cheque or was account payee. He was also not aware of the fact whether it was a `self cheque' or it was issued in the name of any person.

Neither he produce the cheque book issued by the Bank nor did he produce the statement of account received from the Bank. It was also not known to him as to who received the payment of the cheque.

Learned counsel for the appellants has relied upon a decision of the Apex Court in Wadi Vs. Amilal & others (2002 Western Law Cases (SC) Civl 726) and has argued that the documents in questions throw light on the germane issue and therefore and therefore, it would be in the interest of justice that these documents as prayed for in the application under O.41 R.27 may be taken on record as additional evidence in appeal, without which the judgment would be defective and not effective.

I have gone through the case law cited at the bar and in my considered view that above judgment is of no help to the appellants because the facts involved in the above cited case are entirely distinguished from the facts involved in the case at hand. In Wadi's case (supra) the document sought to be taken on record as an additional evidence was a certified copy of mutation no. 49 dated June 11, 1961, while in the case at hand the document prayed to be taken on record is a

certificate of the Bank Manager lacking material information which cannot be said to be germane to the issue in question. That apart, it would be worthy to mention that since the decision of the trial court dismissing the plaintiff's application under Order 13 Rule 2 CPC has attained finality, therefore, the defendants' application under Order 41 Rule 27 CPC for taking on record the documents as an additional evidence cannot be allowed.

For the reasons aforesaid, the application filed under Order 41 Rule 27 is devoid of merit and is liable to be dismissed.

It is an admitted fact that defendant appellants borrowed a sum of Rs. 10,000/- from the plaintiff respondent Ratan Lal on 2.1.1982. It may be reiterated that defendant on one hand takes a plea that he is neither a Proprietor nor a partner of the plaintiff firm. On the other hand he admits execution of documents Exs.1 and 2, may be on some subsequent date. He used to issue cheques in his capacity as partner of the firm. While admitting his signatures on Exs.1 and 2, the defendant appellant No.2 has disclosed himself to be the owner of the firm. Be that as it may, the

defendant No.2 has come with a plea that as against the loan of Rs. 10,000/-, he made payments of Rs. 20,300/- during the period ranging from 26.11.1981 to 18.8.1982 and the plaintiff accepted such payments through Exs. A1 to A7. I fail to understand as to how the payments made by the defendant on 26.11.1981 and 12.12.1981 can be said to be against the amount which he borrowed from the plaintiff on 2.1.1982. The trial court has considered this question at considerable length and after elaborate discussion of evidence has come to a conclusion that the defendant No.2 has not been able to prove by cogent and reliable evidence that he made payments to the plaintiff vide Exs. A1 to A7, inasmuch as the defendant No.2 did not examine any witness except himself so as to prove the payments; no expert was examined to prove the signatures of the plaintiff on the alleged receipts and that the alleged signatures on Exs. A1 to A7, in the opinion of the court, were not tallied with the speciman signatures of the plaintiff.

For the reasons aforesaid, the appeal of the defendant appellants as also the application filed under Order 41 Rule 27 CPC both being devoid of merits are liable to be dismissed and are accordingly

dismissed. In the facts and circumstances of the case, the parties are left to bear their own costs.

(Khem Chand Sharma), J

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